

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,)	
)	
)	
Plaintiff,)	
v.)	Civil Action No. _____
)	
UNITED STATES DEPARTMENT OF JUSTICE, and FEDERAL DEPOSIT INSURANCE CORPORATION,)	FREEDOM OF INFORMATION ACT
)	
Defendants.)	

COMPLAINT

1. This suit under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552 *et seq.*, seeks public access to records showing a particular kind of “government wrongdoing” (SafeCard Services v. SEC, 926 F.2d 1197, 1206 (D.C.Cir. 1991)) – *i.e.*, the wrongful withholding of Brady material¹ as found by a United States Magistrate Judge in Texas. Plaintiff seeks these records as part of an open public study of prosecutorial misconduct, including the wrongful withholding of Brady material, its causes and cures.

PARTIES

2. Plaintiff National Association of Criminal Defense Lawyers (NACDL) is a 501(c)(6) non-profit organization. The organizational mission of the NACDL includes educating the public about the criminal justice system and the operations of government that relate to the criminal justice system.

¹ Throughout this Complaint, the term “Brady material” refers to exculpatory and impeachment materials that the prosecution should disclose to a defendant in a criminal case. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667 (1985); Banks v. Dretke, ___ U.S. ___, 72 USLW 4193 (February 24, 2004) (impeachment materials come within Brady); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Martin (USDC, N.D.Tex, 93-CR-316-G, 97-CV-963-G) (July 23, 1998) (attached in Tab 3, pp.3-1 to 3-12) (United States Magistrate Judge finds a *prima facie* violation of Brady rights by improperly withheld government information).

3. Defendant United States Department of Justice (DoJ) is an agency of the United States. Under the FOIA, Defendant DoJ has supervisory jurisdiction and control over the records of the Federal Bureau of Investigation, and the Executive Office of the United States Attorneys. *See* 28 C.F.R. 16.1 & Appendix I (“components of the Department of Justice”). Defendant DoJ has possession of and control over the records that Plaintiff NACDL seeks.

4. Defendant Federal Deposit Insurance Corporation (FDIC) is a federal government agency. Defendant FDIC has stated that it has possession and control over some records that Plaintiff NACDL seeks.

THE SPECIFIC RECORDS AT ISSUE

5. The specific records sought in this FOIA suit are records showing government wrongdoing, specifically wrongful-withholding of *Brady* material, as found by a United States Magistrate Judge in Texas, and as specifically identified in Plaintiff’s FOIA administrative requests to the United States Department of Justice (DoJ) [attached in Tab 1] and to the Federal Deposit Insurance Corporation (FDIC) [attached in Tab 2].

(a) The records requested from DoJ are:

- o All information about John Generelli in the records that were referred to the Federal Bureau of Investigation (FBI) by the Federal Deposit Insurance Corporation (FDIC) and the Executive Office for United States Attorneys (EOUSA), as the “originating agencies” in the *Martin* FOIA case;²
- o All information about Generelli in the FDIC’s December 14, 1992 memorandum to Theodore Rosenak;³

² The “*Martin* FOIA case” refers to *Martin v. Department of Justice*, USDC, DDC, Civil Action #96-2866 (PLF), currently pending on remand from the United States Court of Appeals for the District of Columbia Circuit, #00-5389 (JUDGMENT) (April 23, 2002) (attached in Tab 5).

³ To further identify this record, Plaintiff’s FOIA administrative requests (attached in Tabs 1 and 2) contain a copy of the first page of this requested FDIC memorandum. *See* Tab 1, p.1-7; Tab 2, p.2-8.

- o All information about Generelli in the Broadway Bank's March 22, 1991 report of Apparent Crime (FBI "Newark File" No. 29B-NK-69023-1 and -2);

- o All information about Generelli in the documents identified in the Hodes Declaration submitted by the government as Tab A to its Motion to Dismiss Or, in the Alternative, for Summary Judgment [#83] (January 15, 1999) in the *Martin* FOIA case, as follows:

Document #20 (FBI "Dallas File" 29B-DL-58080-141)

Document #47 (FBI "Newark File" 29-NK-690233-17)

Document #48 (FBI "Newark File" 29B-NK-69023-20)

Document #66 (FBI File 29A-4840-139);

- o All information about Generelli disclosed for the first time in response to the July 23, 1998 "FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE" in *United States v. Harold H. Martin* (USDC, N.D.Texas) [attached in Tab 3, pp.3-1 to 3-12].

(b) The only records requested from FDIC, and sought in this FOIA lawsuit, are:

- o All information about Generelli in the FDIC's December 14, 1992 memorandum to Theodore Rosenak;⁴

6. There are no ongoing law enforcement proceedings related to any of the FOIA-requested records.

7. Theoretical intrusions on privacy⁵ from FOIA disclosure of the requested records can be minimized, as Plaintiff's FOIA requests point out, in a number of ways—such as by substituting "[X, one of the government's witnesses at Harold Martin's 1994 criminal trial]" for the name of an individual mentioned in the FOIA-requested records.

⁴ FDIC has confirmed that it is withholding this record in its entirety under a claim of FOIA Exemption 5. See FDIC letters dated April 24, 29,30, 2003 (Tab 2, pp.2-9 to 2-10, 2-16, 2-18).

⁵ Only *de minimis* privacy interests are at stake, since Generelli was a witness in a 1994 open public criminal trial, and his suspected involvement in the Broadway Bank frauds is reported in court opinions that are in the open public domain. See, e.g., Tab 3, pp.3-5,3-6,3-10,3-11,3-23,3-24,3-25.

BACKGROUND

8. The requested records confirm that John Generelli was suspected of wrongdoing in the multi-million dollar bank fraud at the Broadway Bank in Patterson, New Jersey, for which Harold Martin was convicted in 1994.

9. John Generelli was a witness for the prosecution at Mr. Martin's 1994 criminal trial. But none of the FOIA- requested Brady material about Generelli was made available to Harold Martin at the time of his 1994 criminal trial.

10. The courts already have determined that Brady material pertaining to Generelli was wrongfully withheld from Harold Martin at his 1994 criminal trial. In post-conviction 2255 proceedings brought by Harold Martin in Texas, a United States Magistrate Judge issued a July 23, 1998 ruling (attached in Tab 3) that the government's wrongful withholding of information about prosecution witness Generelli, at the 1994 criminal trial, established a *prima facie* violation of Harold Martin's Brady rights:

"Without further explanation, the current evidence suggests that at the same time the government was prosecuting movant [Harold Martin], the government (via the FDIC) had information that the person who had the ultimate power of approval over these loans [, Broadway Bank Senior Vice President John Generelli,] had acted dishonestly in securing the transactions." [Tab 3, pp.3-10 to 3-11]

"The Court is not comfortable at this juncture to find, without further review, that full information regarding Generelli's involvement, in defrauding Broadway would not have significantly impacted movant's trial." [Tab 3, p.3-10]

The Texas Magistrate Judge ordered an evidentiary hearing regarding the violation of Martin's Brady rights and specifically

"the existence of any additional documents relating to Generelli in the possession of the government and/or FDIC during this same period" [before Harold Martin's criminal trial and appeal] [Tab 3, p.3-11]

11. After a full 2255 hearing, the federal courts in Texas held that the wrongfully withheld information was not “material” enough to warrant reversal of Harold Martin’s criminal conviction. [Tab 3, pp.3-13 to 3-31] There was government wrongdoing, as the federal courts in Texas held: Information about prosecution witness Generelli was wrongfully withheld from Harold Martin. It was just not “material” enough to overturn Martin’s criminal conviction. The wrongdoing was enough to trigger a 2255 hearing on the violation of Harold Martin’s Brady rights, however.

12. The United States Court of Appeals for the District of Columbia, in its JUDGMENT (April 23, 2002), described the records now sought in this FOIA suit by NACDL as “Brady material pertaining to Generelli.” [Tab 5, p.5-1] Texas federal courts earlier ordered this “Brady material pertaining to Generelli” disclosed to Harold Martin’s criminal defense attorney as wrongfully-withheld Brady material. FOIA disclosure of this specifically-identified “Brady material pertaining to Generelli” is necessary in order to confirm or refute the strong evidence of government wrongdoing provided by the Texas Magistrate Judge’s July 23, 1998 decision. Moreover, FOIA disclosure will aid Plaintiff NACDL’s open public study of prosecutorial misconduct.

13. This suit by Plaintiff NACDL seeking FOIA disclosure of records showing judicially determined “government wrongdoing” – *i.e.*, the wrongful withholding of “Brady material pertaining to Generelli” -- vindicates several important public interests including the public interests in:

- o exposing government wrongdoing, opening to the light of public scrutiny the operations of government and the misconduct of government agencies, and showing the need for reform;
- o monitoring the government’s performance of its statutory duties (*e.g.*, inquiring into where the vast bulk of the \$180 million went that caused the Broadway

Bank to fail);

- o inquiring into the operations of the United States Department of Justice, the Federal Bureau of Investigation, the FDIC, and other government agencies, and significantly contributing to public understanding of the operation of these government agencies;
- o illuminating important public events about a major bank failure;
- o assisting an open public study by plaintiff NACDL of prosecutorial misconduct (including wrongfully withheld Brady material), its causes and cures;
- o assisting the NACDL in its mission and responsibility to educate the public about criminal justice matters;
- o safeguarding the justice and fairness of the criminal justice system, for if the FOIA is unavailable to unearth Brady material, then Brady violations may go undiscovered, unassessed, and unremedied;
- o finding out “what the government is up to,” particularly when the government breaks the law and violates a person’s rights; and
- o confirming the rule of law and the important principle that “uncovering exculpatory material that was improperly withheld by the government is, perhaps, the quintessential example of why FOIA is needed in a supposedly just society.”

ADMINISTRATIVE FOIA REQUESTS

14. Plaintiff administratively requested all the records listed in paragraph 5 under the FOIA. Tab 1 contains Plaintiff’s administrative FOIA requests and appeals to DoJ. Tab 2 contains Plaintiff’s administrative FOIA requests and appeals to FDIC.

15. Originally DoJ took the position in the *Martin* FOIA case that all the requested records were categorically exempt under FOIA Exemption 7(C). DoJ later submitted a Glomar response, saying that it can neither confirm nor deny whether the requested records exist.⁶ On the other hand, FDIC claims that all of its December 14,

⁶ A Glomar response “refus[es] to confirm or deny the existence of any records.” Oguaju v. United States, 288 F.3d 448, 450 (D.C.Cir. 2002), vacated and remanded for further consideration in light of National Archives and Records Administration v. Favish, 541 U.S. ____ (March 30, 2004) (Tab 7, pp.7-3 to

1992 memorandum is covered by FOIA Exemption 5. The United States Magistrate Judge in Texas already has ruled that the requested records exist and that they are wrongfully-withheld Brady material. Neither DoJ nor FDIC has ever responded to the point that the requested records are FOIA disclosable because they show a specific kind of judicially-determined “government wrongdoing” (SafeCard Services v. SEC, 926 F.2d 1197, 1206 (D.C.Cir. 1991)) – *i.e.* wrongful withholding of “Brady material pertaining to Generelli” as found by the United States Magistrate Judge in Texas.

JURISDICTION

16. This Court has jurisdiction over this action pursuant to 5 U.S.C. 552(a)(4)(B).

FREEDOM OF INFORMATION ACT CAUSE OF ACTION

17. Plaintiff NACDL has submitted administrative FOIA requests and appeals seeking the agency records listed in paragraph 5. Defendants DoJ and FDIC have denied all of Plaintiff’s FOIA requests and appeals. Plaintiff has exhausted its FOIA administrative remedies.

18. Plaintiff has a statutory right under the FOIA to the records that it seeks, which consist of wrongfully withheld Brady material as determined by a federal Court in Texas. Because of the Texas court’s Brady disclosure order (*see* Tab 5, pp.5-1 to 5-12), the requested records earlier should have been disclosed to third parties outside the government as Brady material. All the requested records can be FOIA-produced (and Plaintiff has requested that they be FOIA-produced) in a manner that minimizes any theoretical intrusions on privacy, for example by substituting “[X, one of the prosecution witnesses at Harold Martin’s 1994 criminal trial]” for the name of any witness named in

7-20). This sort of Glomar response was first utilized by the CIA in responding to FOIA inquiries about the Hughes Glomar Explorer in Phillippi v. CIA, 546 F.2d 1009 (D.C.Cir. 1976).

the records. The standards of National Archives and Records Administration v. Favish, 541 U.S. ____ (March 30, 2004), call for these records to be FOIA-disclosed, because Plaintiff NACDL has produced sworn affidavits and a court order that “would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.” Favish, slip opin. p.16 (Tab 5, p.5-18). Open public FOIA disclosure of these records will assist Plaintiff NACDL in an on-going open public study of prosecutorial misconduct, including wrongful withholding of Brady material, its causes and cures.

WAIVER OF FOIA FEES

19. Waiver of all search and duplication fees should be ordered under the FOIA, 5 U.S.C. 552(a)(4)(A) in the circumstances of this case. (a) Plaintiff NACDL, the FOIA requester, is a 501(c)(6) non-profit organization. (b) This FOIA request does not serve any commercial interest of the requester. (c) Release of the requested materials will serve the public interest by significantly contributing to public understanding of the operations of DoJ, the Federal Bureau of Investigation, and the FDIC. (d) This FOIA request for wrongfully withheld Brady material is part of an open public study by Plaintiff NACDL of prosecutorial misconduct, including wrongfully withheld Brady material, its causes and cures. (e) The requested records will assist the public education mission of Plaintiff NACDL. (f) An important part of American law is the right under the FOIA to find out “what the government is up to,” particularly when the government breaks the law and violates a person’s rights. (g) At the administrative level Defendants did not dispute Plaintiff NACDL’s entitlement to a waiver of all search and duplication fees under the FOIA. (h) There is a strong public interest in clarifying the law⁷ and establishing that the

⁷ Though several distinguished District Court Judges have expressed their distaste for FOIA suits seeking “Brady material” (*see, e.g., Canning v. United States DoJ*, 919 F.Supp. 451, 457 (D.D.C. 1994))

FOIA can properly be invoked to obtain the disclosure of Brady material that was wrongfully withheld by the government. Indeed, uncovering exculpatory material that was improperly withheld by the government is, perhaps, the quintessential example of why FOIA is needed in a supposedly just society.

WHEREFORE, Plaintiff prays that this Court:

- (a) Declare that defendants' refusal to disclose the records requested by Plaintiff is unlawful;
- (b) Declare that Plaintiff is entitled to a waiver of all search and duplication fees under the FOIA;
- (c) Order defendants to make the requested records available to Plaintiff;
- (d) Award Plaintiff its costs and reasonable attorneys' fees in this action; and
- (e) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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(collecting D.C.Circuit cases)), there is an entire line of decisions from the United States Court of Appeals for the District of Columbia Circuit saying that, where there is strong evidence of "government wrongdoing," FOIA disclosure will be ordered of the records showing wrongdoing. *See, e.g., Spirko v. U.S. Postal Service*, 147 F.3d 992 (D.C.Cir. 1998) (Court of Appeals examines record in FOIA case *de novo* to confirm that it contains no "Brady material"); *SafeCard Services v. SEC*, 926 F.2d 1197, 1206 (D.C.Cir. 1991) (agency records showing "government wrongdoing" must be FOIA disclosed); *Davis v. DoJ*, 968 F.2d 1276, 1282 (D.C.Cir. 1992)(same); *Stern v. FBI*, 737 F.2d 84 (D.C.Cir. 1984) (FOIA requires disclosure of records showing improper FBI surveillance). *See also In re Lindsey*, 158 F.3d 1263, 1273 (D.C.Cir. 1998) ("if there is wrongdoing in government, it must be exposed"); *Columbia Packing v. U.S. Dept. of Agriculture*, 563 F.2d 495 (1st Cir. 1977) (FOIA requires disclosure of records showing bribe-taking by meat inspectors); *Bennett v. DEA*, 55 F.Supp.2d 36, 42 (D.D.C. 1999) (where government wrongdoing is shown in FOIA requested records mentioning individuals by name, FOIA requires disclosure). This suit tests whether and how this line of Court of Appeals decisions applies to FOIA suits seeking Brady material.

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ATTACHMENTS

1. NACDL’s FOIA request and appeal to DoJ Tab 1
2. NACDL’s FOIA request and appeal to FDIC Tab 2
3. Opinions and rulings of the United States Magistrate Judge in Texas
in United States v. Harold H. Martin (USDC, N.D.Tex.) Tab 3
 - (a) Findings, Conclusions and Recommendation (July 23, 1998)
finding wrongful withholding of Brady material
 - (b) Findings, Conclusions and Recommendation (May 21, 1999)
finding the wrongfully-withheld Brady material was not “material”
enough to overturn criminal conviction of Harold H. Martin
4. Affidavits Tab 4
 - (a) Daniel Dodson, NACDL Public Affairs Director
 - (b) Harold Martin
 - (c) Michael Carnes, Esq.
5. Judicial Opinions Tab 5
 - United States Court of Appeals JUDGMENT (April 23, 2002)
in Harold Martin v. DoJ
 - Opinion of the United States Supreme Court in National Archives
and Records Administration v. Favish, 541 U.S. ____ (March 30, 2004)